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No. 85-335

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

VINCENT DiNAPOLI, PETITIONER

v.

NORTHEAST REGIONAL PAROLE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Parole Commission's consideration of petitioner's eligibility for parole under guidelines in effect at the time of his parole hearing, rather than those in effect at the time the offense was committed, violated the Ex Post Facto Clause.

2. Whether petitioner's plea agreement was violated because the Parole Commission, when it concluded that petitioner's release date would in any event have been the same under the guidelines in effect when he committed the offense, determined that the amount of money involved in the offense was in excess of that mentioned in the plea agreement.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-11a) is reported at 764 F.2d 143.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1985. The petition for a writ of certiorari was filed on August 29, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After pleading guilty to one count of racketeering, in violation of 18 U.S.C. 1962(c), petitioner was sentenced to a five-year term of imprisonment and a $25,000 fine.

1. Petitioner was the owner of several dry wall and carpentry companies in the Bronx, New York (C.A. App. 43). He was indicted with several others for demanding and

accepting payments for labor peace for various construction projects (*id.* at 42-54). Petitioner agreed in pleading guilty that he had committed two predicate offenses under the racketeering statute, 18 U.S.C. 1961(5). The first involved the actual receipt in 1979 of $33,000, and the second involved an attempt to extort $100,000 in connection with another construction project (C.A. App. 13, 76). Under the plea agreement, petitioner agreed to repay the $33,000 and the prosecution agreed that it would not claim in its communications to the Parole Commission that the amount involved in the offense was more than $33,000 (Pet. App. 5a).

Petitioner began serving his sentence on March 2, 1983 (Pet. App. 5a), and he received his initial parole hearing on August 23, 1983 (C.A. App. 76). The Parole Commission found after the hearing that under the parole guidelines then in effect (28 C.F.R. 2.20 (1983)), petitioner had an "offense severity rating" of Category Five because his offense "involved racketeering influence of more than $100,000.00 but not more than $500,000.00" (C.A. App. 77). The Commission also found, in light of petitioner's criminal history, that his "salient factor score" under the guidelines was six. Based on this combination of petitioner's offense severity rating and his salient factor score, the guidelines indicated that petitioner should serve between 36 and 48 months in prison (*id.* at 55, 77). The Commission further determined that there was no reason to release petitioner on parole prior to the expiration of 36 months. Because petitioner's statutory release date fell within the parole guideline range, the Commission concluded that he should be continued in prison to the expiration of his sentence, less good time credits (C.A. App. 55).

On March 22, 1984, the National Appeals Board of the Parole Commission affirmed the initial decision (C.A. App. 56). It stated that "[t]he Commission has maintained the position that the guidelines in effect at the time of the initial

hearing are to be utilized unless subsequent guidelines are adopted which would lessen the punishment for the offender" (*id.* at 57). The Appeals Board also informed petitioner (*ibid.*):

> Your offense severity has been correctly rated as Category Five because * * * you were convicted under the RICO statute, 18 U.S.C., Section 1962. However, prior to adoption of the current guidelines, your offense still would have been rated as at least Category Five because it involved receipt or attempted receipt of monies for labor peace exceeding $100,000. The Presentence Report indicates that you and your codefendants would have received $100,000 from another victim which was not paid because the government's investigation surfaced at that point.

2. On August 28, 1984, petitioner filed a petition for a writ of habeas corpus. He alleged that the use of parole guidelines different from those in effect at the time he committed the offense violated the Ex Post Facto Clause of the Constitution (Art. I, § 9, Cl. 3) and that the plea agreement had been violated because the Parole Commission had considered an amount involved in the offense in excess of the $33,000 mentioned in the plea agreement (C.A. App. 4-5). The district court denied the petition (*id.* at 81).

3. The court of appeals affirmed (Pet. App. 3a-11a). It held that the Parole Commission's use of the guidelines in effect when petitioner's parole hearing was held in 1983, rather than those in effect when the offense was committed in 1979, did not violate the Ex Post Facto Clause. The court reasoned that the parole guidelines are not "Laws" within the meaning of the Ex Post Facto Clause, but instead are flexible administrative guideposts intended to assist the Parole Commission in the exercise of its discretion, and that a revision of the guidelines therefore does not implicate the

Ex Post Facto Clause (Pet. App. 8a-10a). The court of appeals did not reach the question whether the plea agreement had been violated by the Commission's alternative application of the 1979 guidelines, because in the court's view the Commission was permitted to apply the 1983 guidelines and the Commission did not rely on the $100,000 offense amount in applying the 1983 guidelines (*id.* at 10a-11a).

ARGUMENT

1. Petitioner contends (Pet. 8-17) that the Commission's application to him of parole guidelines promulgated after he committed his offense violated the Ex Post Facto Clause. For two reasons, this contention does not warrant review.

First, petitioner has not established that the result would have been different if the Commission had relied on the 1979 guidelines. The 1979 guidelines did not contain a provision specifically applicable to RICO offenses. However, the Commission informed petitioner that his offense would have been given the same offense severity rating even under the 1979 guidelines (Pet. App. 6a). Furthermore, even if, as petitioner asserts, his offense would have been rated in Category Four, the Parole Commission was free to set a release date above the suggested guidelines range. In light of the amount of money involved and the fact that the 1979 parole guidelines did not specifically cover RICO offenses, it is entirely possible that the Parole Commission would have done so.

Second, even assuming that petitioner would have received an earlier release date under the 1979 guidelines, the court of appeals correctly held that the application of the 1983 guidelines to his case did not violate the Ex Post Facto Clause. That Clause provides that "No Bill of Attainder or ex post facto Law shall be passed." Only Congress can "pass" a "Law." U.S. Const. Art. I, § 9; *INS* v. *Chadha*, 462 U.S. 919 (1983). Thus, it is clear that the

Clause is addressed to actions of the Legislature, not those of an Executive agency, such as the Parole Commission, that are taken pursuant to a duly enacted law that remains unchanged. As the court of appeals explained, "[t]he clause serves both to assure that legislative acts give fair warning about new punishments and to discourage arbitrary and oppressive legislation" (Pet. App. 7a). See *Weaver* v. *Graham*, 450 U.S. 24, 28-29 (1981). In this case, the relevant statutory provision governing petitioner's release on parole, 18 U.S.C. 4206(a), was enacted in 1976, and it has not been amended since that time.[1] There accordingly has been no "Law" "passed" by Congress since petitioner committed the offense in 1979 that has affected the criteria for his release on parole.

The amendment of the 1979 guidelines in 1983 to incorporate specific guidelines applicable to petitioner's RICO offense does not implicate ex post facto concerns. In 18 U.S.C. 4206, Congress granted the Parole Commission broad discretion in granting parole, just as the judiciary traditionally has had broad discretion under criminal statutes with regard to sentencing. A change in the parole guidelines no more implicates the Ex Post Facto Clause than would a change in judicial sentencing practices. The governing statutes give ample notice that such changes may occur under the broad discretion conferred on the Judicial and Executive Branches. The courts of appeals thus have generally rejected ex post facto claims based on changes in the parole guidelines. See *Inglese* v. *United States Parole Commission*, 768 F.2d 932, 935-939 (7th Cir. 1985);

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[1]The existing statutory provisions governing parole were repealed, effective November 1, 1986, by Sections 218(a)(5) and 235 of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2027, 2031. However, under Section 235(b)(1) of that Act, 98 Stat. 2032, the parole provisions will remain in effect for five additional years with respect to any individual convicted prior to that date.

Dufresne v. *Baer*, 744 F.2d 1543, 1548-1550 (11th Cir. 1984), cert. denied, No. 84-1522 (Oct. 7, 1985); *Paschal* v. *Wainwright*, 738 F.2d 1173, 1180-1181 (11th Cir. 1984); *Roth* v. *United States Parole Commission*, 724 F.2d 836, 840 (9th Cir. 1984); *Artez* v. *Mulcrone*, 673 F.2d 1169, 1171 (10th Cir. 1982); *Warren* v. *United States Parole Commission*, 659 F.2d 183, 195-196 (D.C. Cir. 1981), cert. denied, 455 U.S. 950 (1982); *Hayward* v. *United States Parole Commission*, 659 F.2d 857, 862 (8th Cir. 1981), cert. denied, 456 U.S. 935 (1982); *Rifai* v. *United States Parole Commission*, 586 F.2d 695 (9th Cir. 1978); *Shepard* v. *Taylor*, 556 F.2d 648 (2d Cir. 1977); *Ruip* v. *United States*, 555 F.2d 1331 (6th Cir. 1977). See also *Portley* v. *Grossman*, 444 U.S. 1311 (1980) (Rehnquist, C.J.).[2]

Contrary to petitioner's apparent assertion (see Pet. 14-15), the decision below does not conflict with the decision of the Third Circuit in *United States ex rel. Forman* v. *McCall*, 709 F.2d 852 (1983). The Third Circuit in *Forman* did not hold that the use of revised parole guidelines violated the Ex Post Facto Clause; it merely remanded the case to the district court for a factual determination whether the parole guidelines are inflexibly applied and therefore are, in the court of appeals' view, "Laws" for purposes of ex post facto analysis. 709 F.2d at 862.[3] This Court repeatedly has

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[2]By contrast, in *Weaver* v. *Graham, supra*, upon which petitioner relies (Pet. 8, 11-15), the legislature had amended the statute that adversely affected the prisoner with respect to the length of his incarceration. See Pet. App. 8a-9a.

[3]As petitioner notes (Pet. 14-15), the district court subsequently found as a matter of *fact* that the parole guidelines are "Laws" within the meaning of the Ex Post Facto Clause. The government has taken an appeal from that decision. No. 84-5755 (3d Cir.). The case was argued on June 10, 1985, and was still under submission at the time this brief in opposition was prepared. The argument in *Forman* was consolidated with that in *Royster* v. *Fauver*, No. 84-5887, which was decided on October 18, 1985. The Third Circuit observed in *Royster* that it "maintains that parole regulations may be laws for purposes of ex post fact[o]

declined to grant certiorari in other cases in which the petitioner has asserted a conflict with the Third Circuit's decision in *Forman*, most recently in *Dufresne* v. *Baer, supra*. See also *Gregorio* v. *United States Parole Commission*, cert. denied, No. 83-5699 (Feb. 21, 1984); *Walker* v. *United States Parole Commission*, cert. denied, No. 83-6237 (June 11, 1984); *Hood* v. *United States Parole Commission*, cert. denied, No. 83-6263 (June 11, 1984). There is no reason for a different result here.

2. Petitioner's fact-bound claim (Pet. 18-20) that the Parole Commission violated the plea agreement by considering the $100,000 offense does not merit review by this Court. The prosecution did not violate the plea agreement; in accordance with that agreement, it did not suggest to the Parole Commission that the Commission should rely on the $100,000 offense in setting petitioner's release date. Furthermore, the court of appeals found that the National Appeals Board did not rely on the $100,000 offense in determining petitioner's release date under the 1983 guidelines, which were properly applied in this case (Pet. App. 10a-11a). Petitioner therefore has not identified any concrete injury as a result of the Commission's awareness of the $100,000 offense amount.

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analysis" (slip op. 17), but it declined to resolve that issue because the appellant had failed to demonstrate that a new state parole statute provided stricter parole standards than an old statute or to demonstrate that he was prejudiced by a change in the state parole guidelines. Slip op. 17-18.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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